Loh Chow Sang & Anor v Meru Valley Resort Bhd

HIGH COURT (IPOH) — CIVIL APPEAL NO 12–200 OF 2000
ABDULL HAMID EMBONG J
17 JULY 2001

Civil Procedure *— Summary judgment — Triable issues — Claim for late delivery — Whether triable issues in facts of case — Housing Developers (Control and Licensing) Regulations 1998 Schedule G — Housing Developers (Control and Licensing) Act 1966 — Contracts Act 1950 — Subordinate Court Rules 1980 O 26A*

On 5 July 1995, the appellants entered into a sale and purchase agreement ('SPA') with the respondents in the form as provided under Schedule G of the Housing Developers (Control and Licensing) Regulations 1998 made under the Housing Developers (Control and Licensing) Act 1966 ('the Act'). The respondent's housing project was subsequently abandoned and vacant possession was only delivered on 10 April 1999. Clause 20 of the SPA provided that the respondents were to hand over vacant possession to the appellants within 24 months of signing the SPA. Clause 7 also provided that time shall be of the essence. The appellant applied for summary judgment against the respondent for late delivery. Counsel for the appellants posed two legal questions: (i) whether the respondent could put up a defence to an action by the appellant where the respondent had omitted to obtain a certificate for the waiver or modification of cll 7, 20(1) and 20(2) of the Schedule G statutory agreement; and if so (ii) whether the Contracts Act 1950 ('CA') could be imported into the statutory agreement. The respondent stated, inter alia, that the appellants had acquiesced in the construction works by the new company and led the respondents to believe that no compensation would be claimed as long as the house was completed, the CA should be read into the SPA, cl 7 of the SPA was ineffective and the appellants had waived their rights by their continued payments. The learned sessions court judge dismissed the appellant's application with costs. The appellant appealed.

Held, dismissing the appeal with costs:

(1) The respondent had raised several issues which this court found to be triable and either singularly or collectively as showing cause against the grant of a summary judgment as sought by the appellants (see p 670G).

(2) The SPA made under the Act may be read together with the CA and as such, the application of the term that time shall be of the essence as provided under the terms of the SPA could be interpreted to be of limited application only. In view of the peculiar background to the completion of this project, reference should be made to the CA and the National Land Code 1965 to determine the extent of the application of the time clause in the SPA (see pp 670G–H, 671A).

(3) Factually too, the peculiar background of this case favoured the respondent to disallow the appellants' summary judgment. The respondent had also made a counter-claim against the appellants for late payments of interest and general damages, which needed to be determined at the trial of this suit (see p 671D).

(4) For a summary judgment to be entered, the court would have to be satisfied that the respondent had not raised any bona fide triable issue. Thus, what the respondent needed to do, as they had successfully done in this case, was to show cause that there was a bona bide triable issue to be given leave to defend (see pp 671E, 672A).

(5) The two legal questions posed by the appellants needed no answer for the moment as they too formed part of the legal issues that needed to be determined at a full trial (see p 672F).

[Bahasa Malaysia summary

Pada 5 Julai 1995, perayu-perayu telah memasuki satu perjanjian jual beli ('PJB') dengan responden-responden mengikut cara yang diperuntukkan di bawah Jadual G kepada Peraturan-Peraturan Pemaju Perumahan (Kawalan dan Pelesenan) 1989 yang dibentuk di bawah Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966 ('Akta tersebut'). Projek perumahan responden kemudiannya telah dihentikan dan milikan kosong hanya diserahkan pada 10 April 1999. Fasal 20 PJB memperuntukkan bahawa responden-responden sepatutnya menyerahkan milikan kosong kepada perayu-perayu 24 bulan selepas menandatangani PJB tersebut. Fasal 7 juga memperuntukkan bahawa masa adalah intipati. Perayu telah memohon penghakiman terus terhadap responden kerana serahan lewat. Peguam bagi pihak perayu-perayu telah mengemukakan dua persoalan undang-undang: (i) sama ada responden boleh mengemukakan satu pembelaan terhadap satu tindakan oleh perayu di mana responden telah gagal mendapatkan satu sijil untuk penepian atau pengubahan fasal-fasal 7, 20(1) dan 20(2) Jadual G perjanjian statutori tersebut; dan jika begitu (ii) sama ada Akta Kontrak 1950 ('AK') boleh diimportkan ke dalam perjanjian statutori tersebut. Responden telah menyatakan, antara lain, bahawa perayu-perayu telah bersetuju dengan kerja-kerja binaan oleh syarikat baru tersebut dan ini menyebabkan responden-responden mempercayai bahawa tiada pampasan akan dituntut sekiranya rumah tersebut disiapkan, AK sepatutnya dibaca bersama PJB tersebut, fasal 7 PJB tidak berkuatkuasa dan perayu-perayu telah mengenepikan hak-hak mereka dengan bayaran berterusan mereka. Hakim mahkamah sesyen yang arif telah menolak permohonan perayu dengan kos. Perayu telah membuat rayuan.

Diputuskan, menolak rayuan tersebut dengan kos:

(1) Responden telah menimbulkan beberapa persoalan di mana mahkamah mendapati perlu dibicarakan dan sama ada secara

berasingan atau bersama sebagai menunjukkan sebab menentang penghakiman terus sebagai mana yang dipohon oleh perayu-perayu (lihat ms 670G).

(2) PJB yang dibentuk di bawah Akta tersebut boleh dibaca bersama dengan AK dan oleh itu, permohonan tentang terma di mana masa adalah intipati sebagai mana yang diperuntukkan di bawah terma-terma PJB boleh ditafsirkan sebagai permohonan yang terhad sahaja. Berdasarkan latar belakang aneh tentang penyelesaian projek ini, rujukan sepatutnya dibuat kepada AK dan Kanun Tanah Negara 1965 untuk menentukan ruang lingkup fasal masa dalam PJB tersebut (lihat ms 670G–H, 671A).

(3) Mengikut fakta juga, latar belakang aneh kes ini berpihak kepada responden untuk tidak membenarkan penghakiamn terus perayu-perayu. Responden juga telah membuat satu tuntutan balas terhadap perayu-perayu kerana bayaran lewat faedah dan ganti rugi am, yang perlu ditentukan di perbicaraan guaman ini (lihat ms 671D).

(4) Untuk satu penghakiman terus dimasuki, mahkamah seharusnya berpuas hati bahawa responden tidak menimbulkan apa-apa persoalan bona fide yang boleh dibicarakan. Oleh itu, apa yang responden perlu buat, sebagai mana yang dengan jayanya telah mereka lakukan di dalam kes ini, adalah untuk menunjukkan bahawa terdapat persoalan bona fide yang perlu dibicarakan agar diberikan kebenaran membuat pembelaan (lihat ms 671E, 672A).

(5) Dua persoalan undang-undang yang diutarakan oleh perayu-perayu tidk perlu dijawab buat masa ini kerana ia membentuk sebahagian daripada persoalan undang-undang yang perlu ditentukan di satu perbicaraan penuh (lihat ms 672F).]

Notes

For cases on triable issues generally, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6103–6173.

Cases referred to

Abdul Rahim bin Syed Mohd v Ramakrishnan Kansasammy [1996] 3 MLJ 387 (refd)

Aw Yong Wai Choo v Arief Trading SB [1992] 1 MLJ 167 (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)

Chye Fook & Anor v Teh Teng Seng Realty SB [1989] 1 MLJ 308 (refd)

Memphis Rogues Ltd v Skalbania (1982) 38 BCLR 193 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

SEA Housing SB v Lee Poh Choo [1982] 2 MLJ 31 (refd)

Syn Lee & Co Ltd v Bank of China [1961] MLJ 87 (refd)

Legislation referred to

Housing Developers (Control and Licensing) Act 1966
Housing Developers (Control and Licensing) Regulations 1989 reg 11(3), Schedule G
Contracts Act 1950
National Land Code 1965
Subordinate Courts Rules 1980 O 26A

G Sumathi (FC Thai & Bala Associates) for the appellant.
R Jegatheesa (RJ Esa & Co) for the respondent.

Abdull Hamid Embong J: On 2 November 2000, the learned sessions court judge at Ipoh had dismissed with costs the appellants' application for summary judgment pursuant to O 26A of the Subordinate Courts Rules 1980 ('the SCR'). The appellants had claimed for liquidated damages in the sum of RM39,698.62 against the respondent for late delivery (of 644 days) of a house constructed by the respondent in a housing scheme project in Ipoh known as the Meru Valley Resort ('the project'). On 5 July 1995, the appellants had entered into a sale and purchase agreement ('SPA') with the respondent in the form as provided under Schedule G of the Housing Developers (Control and Licensing) Regulations 1989 ('the Regulations') made under the Housing Developers (Control and Licensing) Act 1966 ('the Act'). The SPA was entered into with the previous management of the respondent company. The project was abandoned in November 1995 and the respondent company was taken over by a new set of shareholders in August 1997 who then revived the project. The construction of the houses including the appellants' were completed on or before 4 January 1999. It was in evidence that the appellants had not objected to, but had in fact encouraged, the new management from taking over and completing the project. This had to be so as it was in the appellants' interest to see to the project's completion.

Clause 20(1) of the SPA had provided that the respondent hand over vacant possession to the appellants within 24 months of signing of the SPA. Vacant possession was delivered on 10 April 1999 and the respondent was thus, allegedly, responsible for delay of 644 days. Clause 7 of the SPA also provided that time shall be of the essence in relation to all the provisions of the SPA.

The appellants contended that the Act is comprehensive and self contained, and that the respondent must strictly comply with the purpose of the Act which was enacted to protect the weaker party (purchasers). The respondent was therefore legally bound to operate within the parameters of the provisions of the Act, including the SPA which had been statutorily provided (Schedule G). Further, the parties cannot waive or contract out of the statutory agreement, (see *SEA Housing SB v Lee Poh Choo* [1982] 2 MLJ 31). Only the Controller of Housing may alter or modify the terms of the SPA where special circumstances, hardships or necessity calling arise for such modifications or alterations (see reg 11(3) of the Regulations). Since, in this case, the respondent had failed to obtain permission to waive or modify the SPA, as provided under the regulations, and is now out of

time to do so, the respondent had failed to meet the purposive intent of the Act which is the protection of house purchasers, including the appellants. Learned counsel for the appellants also argued that the Contracts Act 1950 ('the CA') has no place in respect of contracts for the purchase of houses made under the Act, and thus the former cannot be used as a shield to overcome the respondent's non-compliance of reg 11(3) of the Regulations. Learned counsel posed two legal questions for this court's determination, worded as such:

(i) whether the developer (respondent) could put up a defence to an action by the appellant (purchaser) where the respondent (developer) had first failed to avail himself to a comprehensive statutory mechanism provided for in reg 11(3) of the Regulations, and omitted to obtain a certificate for the waiver or modification of cll 7, 20(1) and 20(2) of Schedule G statutory agreement;

in the event the answer to (a) above is 'Yes'; then

(ii) whether the provisions of CA can be imported into the statutory agreement to circumvent/curtail/defeat the operation of cll 7, 20(1) and (2) when there has been prior non-compliance of reg 11(3) by the respondent (developer).

The respondent took the stand that there are triable issues to be determined, and as such, summary judgment is inappropriate. Firstly, it was submitted that the peculiar background of this case shows that the appellants had acquiesced in the construction works undertaken by the new management of the respondent company, and had led the respondent to believe that the appellants would not be claiming any compensation so long as the house was completed. It was also submitted that the provisions of the CA should be read into the SPA, and that the completion of the house by a particular date was not fundamental. Further, it was submitted that cl 7 of the SPA (on time being of the essence) was also rendered ineffective, in view of the new arrangement by the parties. It was also submitted in the alternative, that the continued payments by the appellants of the instalments of the purchase price after the respondent's new management took over the stalled project, means that the appellants had waived their rights under the SPA.

In my view, the respondent had raised several issues which this court found to be triable and either singularly or collectively as showing cause against the grant of a summary judgment as sought by the appellants.

One is that the SPA made under the Act need not be read alone but may be read together with the CA and as such, the application of the term that time shall be of the essence as provided under the terms of the SPA could be interpreted to be of limited application only. Under s 56 of the CA time, in a contract for the sale of land, is of the essence in two main situations, ie: (i) where the intention of the parties was such that time was of the essence of the contract for the fulfillment of their respective obligations; and (ii) the nature of the subject matter or the surrounding circumstances are such that the time specified for the performance is of the essence (*Abdul Rahim bin Syed Mohd v Ramakrishnan Kansasammy* [1996] 3 MLJ 387).

Learned counsel for the respondent took the stand, with which I agree, that the SPA in this case, in view of the peculiar background to the completion of this project, should not be read alone but also reference be made to the CA and the National Land Code 1965, to determine the extent of the application of the time clause in the SPA. Reference was made to the case of *Aw Yong Wai Choo v Arief Trading SB* [1992] 1 MLJ 167 where it was held that a sale and purchase agreement made under the Act, even if found to be in breach of the rules made thereunder, could not be rendered illegal.

In the case of *Chye Fook & Anor v Teh Teng Seng Realty SB* [1989] 1 MLJ 308, Abdul Malek Ahmad J (now FCJ) discussed the rights of parties under a sale and purchase agreement situation where the contract stipulates that time be of the essence, and in particular, the option opened to a purchaser under s 56 of the Contracts Act and held that the remedies under the regulations were designed to improve and supplement the common law remedies.

Factually too, this court holds the view that the peculiar background of this case favours the respondent to disallow the appellants summary judgment. The respondent had also made a counterclaim against the appellants for late payments of interest and general damages, which in my view, needs to be determined at the trial of this suit.

For a summary judgment to be entered, the court will have to be satisfied that the respondent had not raised any bona fide triable issue. The approach this court takes is found in the words of Thompson CJ in *Syn Lee & Co Ltd v Bank of China* [1961] MLJ 87, stating at p 87:

> With great respect it seems to me there may have been some slight misapprehension on the part of the assistant registrar and on the part of the trial judge as to the proper approach. It is not quite the same as the problem with which we are always being faced in the chancery side of the court of trying issues on affidavit evidence. In a case of this sort, it is not a case of trying the issues on affidavit evidence, it is rather a question of deciding on affidavit evidence whether there is a moral improbability of a very high degree that the defendant can possibly succeed.
>
> On the other hand we have to remember that the order is there as much in the interests of defendants as in the interests of plaintiffs. It is in the interest of plaintiffs, that they should he able to get prompt judgment when there is no real defence. But, on the other hand, it is in the interest of defendants in such cases that plaintiffs should be able to get judgments not only expeditiously but economically. (emphasis added)

The underlined words above, when viewed conversely, show that only in cases of undoubted certainty will a plaintiff succeed in obtaining a summary judgment.

In *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, the Court of Appeal gave this reminder at p 289:

> It is important to bear in mind that O 14 is a summary judgment procedure and not a summary trial procedure.

Thus, what the respondent needs to do, as they have successfully done in this case, is to show cause that there is a bona bide triable issue to be given leave to defend.

And the same court endorsed the principle from the case of *Memphis Rogues Ltd v Skalbania* (1982) 38 BCLR 193, by quoting the following passage:

> The question has been stated in a number of ways; is there no real substantial question to be tried? Is there no dispute as to facts or law which raises a reasonable doubt? Is it manifestly clear that the appellants are without a defence that deserves to be tried? Although cast in different terms, all point to the same inquiry, is there a bona fide triable issue?

And finally, as regards the scope that the applicability of the summary judgment procedure be limited to virtually uncontested or uncontestable cases, the Supreme Court had stated in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, in the judgment of Gunn Chit Tuan SCJ who said at p 414:

> The scope of O 14 proceedings meant for cases which are virtually uncontested or uncontestable is now determined by the Rules of the High Court 1980. Generally where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona tide defence, he ought to have leave to defend, Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases (see *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 332; *Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perils Sdn* [1987] 2 MLJ 332). It was held in the well-known House of Lords' case of *Jacobs v Booth's Distillery Co* (1901) 85 LT 262 that a complete defence need not be shown. The defence need only show that there is a triable or question or that for some other reason there to be a trial, and leave to defend ought to be given. In fact, even though the defence is not clearly established, but only reasonable probability of being a real defence, leave to defend should be (*Manger v Cash* (1889) 5 TLR 271).

The two legal questions posed by the appellants need no answer for the moment. In my view, they too formed part of the legal issues that needed to to be determined at a full trial.

For the above reasons, this appeal is dismissed with costs.

Appeal dismissed with costs.

Reported by Chew Phye Ken